Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–4147 OF 2001
ABDUL MALIK ISHAK J
2 JANUARY 2003

Contract *— Rescission — Building contract — Building plans — Misstatement that building plans approved — Building plans subsequently approved —Whether purchaser allowed to rescind the contract*

Contract *— Rescission — Sale and purchase of building — Sale of office — Misstatement of actual area — Whether purchaser allowed to rescind the contract*

The defendant was the developer of a building project. By a sale and purchase agreement dated 15 March 1996 ('the agreement') the first plaintiff agreed to buy from the defendants Suite 1202, Tower B measuring approximately 1,592 sq ft in area ('the property'). Under the agreement, the defendant assured the first plaintiff that 'the building plans for the development ... have been approved by the appropriate authority'. However, it transpired that the building plans were only approved by Kuala Lumpur City Hall on 5 February 1997. When the property was ready for delivery of vacant possession, the size of the property had been reduced to 1470 sq ft — a shortfall of 122 sq ft. The first plaintiff wrote to the defendant terminating the agreement. The plaintiffs then sought a declaration that, the defendant having breached the terms of the agreement, the first Plaintiff has rightfully terminated/rescinded the agreement. The defendant argued that the agreement provided that the defendant was entitled, from time to time, to make such amendments, variations or substitutions to the plans, as may be required by the appropriate authority or as its architect considered expedient or necessary, and that such amendments, variations or substitutions should not give rise to, or form the basis of, any claim by the first plaintiff against the defendant. The first plaintiff had acknowledged that the area of the suite was a mere estimation and not a conclusive computation of the area and that the defendant was entitled to make any necessary amendments, variations or substitutions as required by the defendant's architect or the authorities.

Held, allowing the application, with damages to be assessed:

(1) The first plaintiff had relied on the representations by the defendant pertaining to the size of the property and that, at the time the agreement was executed, the building plans had been approved by the appropriate authority. These representations were false and they constituted misrepresentations in law. The defendant knew about the project wherein the property was a part of it and whatever representations the defendant made in the agreement must be held against the defendant as misrepresentations (see p 668B–C).

(2) The defendant had failed to show proof that it was 'expedient' or 'necessary' to make any such 'amendments, variations or substitutions' to the approved building plans. The right of the defendant as the vendor to 'vary, change, amend or alter' the shop office project wherein the property was located could only be done on the approved building plans and could not have been done on building plans which had yet to be approved, bearing in mind that such variation, change, amendment or alteration would require the approval of the appropriate authority (see pp 677H–678B).

(3) The building plans not having been approved by the appropriate authority, they should rightly be termed the 'proposed building plans'. If the appropriate authority had not approved the building plans, the first plaintiff would not have executed the agreement. The defendant had not shown any evidence that the approved building plans had to be amended or altered or that such amendments or alterations have been necessitated or approved by the appropriate authority (see p 678B–E).

[Bahasa Malaysia summary

Defendan adalah pemaju satu projek pembangunan. Melalui satu perjanjian jual beli bertarikh 15 Mac 1996 ('perjanjian itu') plaintif pertama bersetuju membeli daripada defendan hartanah yang dikenali sebagai Suite 1202, Tower B berukuran lebih kurang 1,592 kaki persegi luas ('hartanah itu'). Di bawah perjanjian itu, defendan telah menyakinkan plaintif pertama bahawa 'plan pembangunan itu ... telah diluluskan oleh pihak berkuasa yang wajar'. Walaubagaimana pun didapati pelan pembangunan hanya diluluskan Dewan Bandaraya pada 5 Februari 1997. Apabila hartanah itu siap bagi pemberian milikan kosong, luas hartanah itu telah dikurangkan kepada 1470 kaki persegi — kekurangan 122 kaki persegi. Plaintif pertama menulis kepada defendan menamatkan perjanjian itu. Plaintif kemudian memohon pengisytiharan bahawa, memandangkan yang defendan telah mungkiri terma perjanjian itu, maka plaintif pertama telah menamatkan/membatalkan perjanjian itu secara wajar. Defendan membantah mendakwa perjanjian itu memperuntukkan bahawa defendan berhak, dari masa ke semasa, membuat pindaan, perubahan atau penggantian kepada pelan, sepertimana diperlukan oleh pihak berkuasa yang wajar atau yang difikirkan wajar dan perlu oleh akitek defendan, dan bahawa pindaan, perubahan atau penggantian tidak harus menimbulkan, atau menjadi asas, sebarang tuntutan oleh plaintif pertama terhadap defendan. Plaintif pertama telah memperakui luas hartanah itu anggaran semata-mata dan bukannya suatu penaksiran muktamad luasnya dan bahawa defendan berhak membuat pindaan, perubahan atau penggantian yang mungkin diperlukan oleh akitek defendan atau pihak berkuasa.

Diputuskan, membenarkan permohonan itu, dengan perintah supaya ganti rugi ditaksirkan: A

(1) Plaintif pertama telah bergantung kepada representasi yang telah dibuat defendan berkaitan luas hartanah itu dan bahawa, pada masa perjanjian itu ditandatangani, pelan pembangunan telah diluluskan oleh pihak berkuasa yang wajar. Representasi ini adalah tidak benar maka ia adalah salah representasi di sisi undang-undang. Defendan tahu mengenai projek di mana hartanah itu menjadi sebahagian dan sebarang representasi defendan yang dibuat dalam perjanjian harus dianggap menentang defendan sebagai salah representasi (lihat ms 668B–C). B

(2) Defendan gagal membuktikan bahawa adalah 'wajar' atau 'perlu' membuat sebarang 'pindaan, perubahan atau penggantian' kepada pelan pembangunan yang diluluskan. Hak defendan sebagai penjual supaya 'mengubah, meminda, memperbaiki atau menukar' projek pejabat kedai di mana hartanah itu dikandung hanya dapat dilakukan di atas pelan pembangunan yang diluluskan dan tidak dapat dibuat di atas pelan pembangunan yang belum diluluskan, memandangkan yang sebarang pindaan, perubahan atau penggantian memerlikan kelulusan pihak berkuasa yang wajar (lihat ms 677H–678B). C D

(3) Pelan pembangunan yang belum diluluskan sepatutnya dikenali sebagai 'pelan pembangunan yang disyorkan'. Sekiranya pihak berkuasa yang wajar belum meluluskan pelan pembangunan itu, plaintif pertama tidak mungkin menandatangani perjanjian itu. Defendan gagal menunjukkan sebarang bukti yang pelan pembangunan yang diluluskan telah diwajibkan dipinda atau diubah atau bahawa sebarang pindaan atau perubahan itu telah diwajibkan atau diluluskan pihak berkuasa yang wajar (lihat ms 678B–E).] E F

Notes

For cases on rescission of building contracts, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4140. G

For cases on rescission of sale and purchase of building, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4172–4174.

Cases referred to H

Abram SS Co v Westville Shipping Co Ltd [1923] AC 773 (refd)

Attwood v Small (1838) 6 CI & Fin 232 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Car and Universal Finance Co Ltd v Caldwell [1965] 1 QB 525, [1964] 1 All ER 290 (refd) I

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Clough v London and North Western Rly Co (1871) LR 7 Ex 26 (refd)
Davidson v Gwynne (1810) 12 East 381 (refd)
Edgington v Fitzmaurice (1885) 29 ChD 459 (refd)
Hadley v Baxendale (1854) 9 Ex 341 (refd)
Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd [1962] 2 QB 26;[1962] 1 All ER 474 (refd)
Lam Gow & Anor v Maju-Tekno Sdn Bhd & Anor [1994] 3 CLJ 783; [1994] MLJU 540 (refd)
Newbigging v Adam (1886) 34 ChD 582 (refd)
Robinson v Harman (1880) 5 App Cas 25 (refd)
Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163 (refd)
Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok [1997] 3 MLJ 211 (refd)
Smith v Land and House Property Corporation (1884) 28 ChD 7 (refd)
Teoh Kee Keong v Tambun Mining Co Ltd [1968] 1 MLJ 39 (refd)
Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd (1938) 38 SRNSW 632 (refd)
Wallis, Son and Wells v Pratt and Haynes [1910] 2 KB 1003 (refd)
Yeo Brothers Co (Pte) Ltd v Atlas Properties (Pte) Ltd [1988] 1 MLJ 150 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 ss 18, 19, 40, 65, 76
Rules of the High Court 1980 O 42 r 12

R Shanmugam (*T Shamini* with him) (*Nasharuddin YK Chew & Partners*) for the plaintiffs.
Ramesh Subramaniam (*Rastam Singa & Co*) for the defendant.

Abdul Malik Ishak J:

Enclosure 1

This was a summons in chambers filed by the plaintiffs for the following prayers:

(4) a declaration that the defendant has breached the terms of the sale and purchase agreement dated 15 March 1996 and that the first plaintiff has rightfully terminated/rescinded the said sale and purchase agreement via a letter dated 13 February 2001 or whichsoever date the honourable court finds just and fair or in the alternative declaration that the sale and purchase agreement is hereby rescinded due to the breach of contract by the defendant;

(5) the defendant is to refund the entire monies paid pursuant to the sale and purchase agreement amounting to RM816,696 that was paid by the plaintiffs;

(6) the defendant to pay special damages amounting to RM109,615.18 (the full details of which are contained in the supporting affidavit), or in the alternative special damages to be assessed by the honourable court;

(7) the defendant to pay general damages that is to be assessed by this honourable court;

(8) the defendant to pay interest at the rate of 8%pa on the sum in para (2) above from 10 September 1998 (date of breach) till full settlement;

(9) the defendant to pay interest at the rate of 8%pa on the sum in para (3) from the date of filing of originating summons till full settlement;

(10) the damages as contained in paras (2), (3), and (4) above is to be used to redeem the charge from the second plaintiff; and

(11) all further and other reliefs.

And the facts may be stated as follows. Pursuant to a sale and purchase agreement dated 15 March 1996, the first plaintiff agreed to purchase from the defendant a piece of property known as Suite No 1202, Tower No B, Wisma Pantai, Kuala Lumpur ('the said property') for the purchase price of RM816,696 subject to the terms and conditions as contained in the sale and purchase agreement ('the said agreement'). Credit facilities were extended by the second plaintiff — RHB Bank Berhad, to the first defendant and so, pursuant to a loan agreement cum deed of assignment dated 6 December 1996 the first plaintiff had assigned all its rights to the said agreement to the second plaintiff absolutely.

The relevant terms and conditions of the said agreement which the defendant represented to the first plaintiff were:

(1) by way of s 2.04 of the said agreement where it is stipulated that:

> The Building Plans for the development of the shop office with the normal amenities and services upon a portion of the said land have been approved by the Appropriate Authority.

(2) by way of s 1.01 of the said agreement where it defines 'suite' to mean 'the unit of shoplot/office premises the particulars of which are stated in s 3 of Schedule A hereto which the vendor has by this agreement agreed to sell to the purchaser which for the purpose of identification is outlined in red in the floor plan annexed hereto as Appendix II.' Now, s 3 of Schedule 'A' states as follows:

3	Particulars of the suite(s)	Suite No 1202
		Tower No B measuring in
		Area Approximately 1,592sq ft

So, the firsti plaintiff contracted to purchase the said property at the purchase price of RM816,696 and the said property measured in area approximately 1,592 sq ft with the building plans having been approved by the appropriate authority. It was as simple as that.

The defendant also offered the first plaintiff an option scheme known as the 'Guaranteed Rental Return Scheme' wherein the defendant, inter alia, guaranteed the return of the rental amounting to 10% of the sale and purchase price for a period of six years. But the first plaintiff did not exercise the said option because the first plaintiff purchased the said property for 'owner occupancy'. The first plaintiff was desirous of occupying the said property and this fact was made known to the defendant and clearly this was within the defendant's knowledge.

Acting upon the terms and conditions of the said agreement, the first plaintiff fulfilled its obligations and duly paid the defendant the entire purchase price. In the meantime, by letter dated 10 September 1998, the defendant forwarded a floor plan of the said property which was substantially and materially different from the floor plan as contained in Appendix II of the said agreement. Any person in the shoes of the first plaintiff upon perusal of the floor plan that accompanied the letter dated 10 September 1998 as seen in exh 'TAP-4' of encl 2 — which was an affidavit affirmed by Tai Ah Peow on 5 November 2001 on behalf of the first plaintiff, would certainly be able to tell the difference with the floor plan marked in red ink in Appendix II of the said agreement. The difference in the floor plan was the sore point for the first plaintiff. It was a shortfall of 122 sq ft.

Misrepresentation number 1

By letters dated 12 January 1999 as seen in exhs 'TAP-5' and 'TAP-6' of encl 2, the defendant duly informed the first plaintiff that:

(1) the said property was ready for vacant possession to be delivered even though the temporary certificate of fitness for occupation ('TCF') has yet to be issued and that the first plaintiff was advised not to occupy the said property until such time as the TCP was issued (see 'TAP-5' of encl 2); and

(2) the size of the said property had been reduced to 1470 sq ft from 1592 sq ft — a loss or a shortfall of 122 sq ft (see 'TAP-6' of encl 2).

The first plaintiff by letter dated January 29, 1999 (exh 'TAP-7' of encl 2) addressed to the defendant expressed its dissatisfaction that the floor plan of the said property had been reduced by 122 sq ft and, consequently, the first plaintiff had to shelve its plan from occupying the said property because of the space constraint. The first plaintiff expressed its disappointment in strong language and it sought an explanation from the defendant for that short fall. And by letter dated 30 September 1999 as seen in exh 'TAP-8' of encl 2, the first plaintiff, in not so perfect a language, stated its intention to rescind the said agreement stemming from the short fall in the size of the office space.

It seemed that that shortfall in the size of the office suite had defeated the purpose of the first plaintiff in purchasing the said property because the finished product was not suitable for the first plaintiffs business enterprise.

Misrepresentation number 2

Of pertinence, would be a letter dated 22 January 2001 from the Dewan Bandaraya Kuala Lumpur as seen at exh 'TAP-9' of encl 2, which letter categorically stated that the building plans in relation to the said property were approved only on 5 February 1997. This piece of information advanced by the Dewan Bandaraya Kuala Lumpur was indeed crucial. It showed that there was, in fact, a material contradiction with the terms and conditions of the said agreement which stated that the building plans have been approved by the appropriate authority even before the first plaintiff signed the agreement on 15 March 1996. The reality of the matter was this: that the building plans were only approved by the appropriate authority — referring to the Dewan Bandaraya Kuala Lumpur, on 5 February 1997.

It was not an occasion for the first plaintiff to rejoice. Aggrieved that there was a failure on the part of the defendant to keep to the terms and conditions of the said agreement, the first plaintiff then gave notice by letter dated 30 September 1999, as alluded to earlier, to rescind the said agreement for breach of contract.

The law and the arguments thereto

It is trite law that the effect of a misrepresentation is to render the contract voidable and not void. This simply means that the contract is construed to be valid between the parties unless and until it is set aside by the representee — referring to the first plaintiff in the context of the present case. Support for this simple proposition of the law can be found in the case of *Newbigging v Adam* (1886) 34 ChD 582 at p 592. It is the law that when the representee discovers the misrepresentation, the representee may make an election: to affirm or to rescind the contract (see *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok* [1997] 3 MLJ 211 at p 220). Once the representee makes it clear, just like the first plaintiff did, that the representee refuses to be bound by the contract then the contract in question is terminated ab initio as if it had never existed. That would be the state of the law. To borrow the sage words of Lord Atkinson in *Abram SS Co v Westville Shipping Co Ltd* [1923] AC 773 at p 781:

> Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.

According to the case of *Clough v London and North Western Rly Co* (1871) LR 7 Ex 26 at p 35 that once an election is unequivocally made, be it in favour of affirmation or of rescission, then the matter comes to an end forever. The election remains put and it cannot be revived since, in law, there is no such thing as partial rescission (see *Segar Oil Palm Estate Sdn Bhd v Tay Tho Bok*). Once the representee decides to rescind the contract, the representee must communicate his decision to the representor within a reasonable span of time. This is to enable the representor to know the exact position pertaining to the contract because the representor is entitled to treat the contract as subsisting unless he is duly informed of its termination (see *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525, [1964] 1 All ER 290). It is the court that pronounces rescission. Once the representee elects to terminate the contract it would effectively destroy the contractual link between him and the representor (see *Abram SS Co v Westville Shipping Co Ltd*). The effect of rescission is quite drastic. It nullifies the contract ab initio. And when the contract is wholly performed — like the present case where the first plaintiff had paid the full purchase price, then the parties must be restored to their original positions. The latin phrase for this occasion would be restirutio in integrum. Section 65 of the Contracts Act 1950 enacts as follows:

> 65 Consequences of rescission of voidable contract
>
> When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore the benefit, so far as may be, to the person from whom it was received.

and it is self-explanatory in that the said property would revert to the defendant upon rescission of the contract. Then there is s 76 of the Contracts Act 1950 which enacts as follows:

> 76 Party rightfully rescinding contract entitled to compensation
>
> A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.
>
> *ILLUSTRATION*
>
> *A,* a singer, contracts with *B,* the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B* engages to pay her $100 for each night's performance. On the sixth night *A* wilfully absents herself from the theatre, and *B,* in consequence, rescinds the contract. *B* is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

and flowing from it, the first plaintiff sought for the refund of the purchase price and for damages suffered thereunder. It would also be ideal to refer to s 18 of the Contracts Act 1950 which states as follows:

18 'Misrepresentation' A

'Misrepresentation' includes —

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and B

(c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement." C

And this would be followed by s 19 of the Contracts Act 1950:

19 Voidability of agreements without free consent

(1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused, D

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. E

Exception — If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence. F

Explanation — A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

ILLUSTRATIONS G

(a) *A,* intending to deceive *B,* falsely represents that five hundred gantangs of indigo are made annually at *A*'s factory, and thereby induces *B* to buy the factory. The contract is voidable at the option of *B.*

(b) *A,* by a misrepresentation, leads *B* erroneously to believe that five hundred gantangs of indigo are made annually at *A*'s factory, *B* examines the accounts of the factory, which show that only four hundred gantangs of indigo have been made. After this *B* buys the factory. The contract is not voidable on account of *A*'s misrepresentation. H

(c) *B,* having discovered a vein of ore on the estate of *A,* adopts means to conceal, and does conceal, the existence of the ore from *A.* Through *A*'s ignorance *B* is enabled to buy the estate at an undervalue. The contract is voidable at the option of *A.* I

A (d) *A* is entitled to succeed to an estate at the death of *B; B* dies; *C*, having received intelligence of *B*'s death, prevents the intelligence reaching *A*, and thus induces *A* to sell him his interest in the estate. The sale is voidable at the option of *A*.

I pause here to take stock of the situation and I have this to say.

B In simple language, a misrepresentation is a representation that is untrue. It is a false statement made by one party to the contract to the other, before, or at the time of, contracting, on which that other party relied in contracting. If the representor falsely states his intention, then he has falsely misrepresented the fact. A classic example would be the case of *Edgington v* C *Fitzmaurice* (1885) 29 ChD 459. In that case, the directors of a company issued a prospectus inviting subscriptions for debentures with a view to raise money. The prospectus stated that it was intended to use the money obtained to make improvements in the company by altering its buildings, purchasing horses and vans, and developing the trade of the company. In actual fact, the real intention of the company was to use the money obtained D to pay off existing debts of the company. It was held that a fact had been misrepresented because there was no intention on the part of the company to use the money in the manner it had stated. Bowen LJ, in style, said at p 483 of the report:

> The state of a man's mind is as much a fact as the state of his digestion. It E is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

The court in *Smith v Land and House Property Corporation* (1884) 28 ChD F 7, held that there was misrepresentation in that case. That was a case where the plaintiff had put up a hotel for sale. The particulars stated that it was 'let to Mr F Fleck (a most desirable tenant), at a rental of £400pa, for an unexpired term of twenty-seven and a half years'. Mr F Fleck was not a desirable tenant; he had not been paying his rent on time, and was always in arrears. Bowen LJ held that there was misrepresentation. At p 15 of the G report, his Lordship Bowen LJ said:

> ... if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

H and his Lordship refused the plaintiffs claim for specific performance of the sale contract and allowed the defendant to rescind the contract for misrepresentation.

For misrepresentation to be operative in law, that misrepresentation must be relied upon. And that its reliance must have induced the contract. I A good example would be the case of *Attwood v Small* (1838) 6 CI & Fin 232, and the facts may be stated as follows. There, Attwood was selling a mine. He made exaggerated and untrue statements as to its earning

capacity. But before agreeing to buy the mine, Small sent his own experts to assess the mine's capacity. They concurred in Attwood's assessment. When the true factual situation was discovered, Small decided to rescind the contract for misrepresentation. The House of Lords held that the action for rescission failed because Small had relied upon his own experts rather than on Attwood's representation.

It would appear that the degree of reliance on the misrepresentation is a crucial factor.

Now, in the context of the present case, the first plaintiff had relied on the material representations by the defendant pertaining to the size of the said property to be 1,592 sq ft and that at the time the said agreement was executed the building plans have been approved by the appropriate authority. These material representations were false and they constituted misrepresentations in law. At no time did the first plaintiff employed its own experts to ascertain the truth of these two representations before executing the said agreement like what Small did in the case of *Attwood v Small*. The defendant knew about the entire project wherein the said property was part of it and whatever representations which the defendant made in the said agreement must be held against the defendant as material misrepresentations when those representations were found to be false — untrue. That would be the gravamen of the whole matter.

Ranita Hussein JC in *Lam Gow & Anor v Maju-Tekno Sdn Bhd & Anor* [1994] 3 CLJ 783; [1994] MLJU 540 had occasion to deal with the issue of a rescission of an agreement for the sale and purchase of a piece of land with a terrace house thereon and her Ladyship rightly said at pp 785–786 of the report:

> In my view, the reduction by 25.19% in the size of the land alone can be regarded as having transformed the subject matter of the sale into one which the purchasers would not have purchased had they known of the true position at the time of the signing of the agreement. In other words, the difference aforesaid would not give the purchasers substantially 'what they bargained for'.
>
> For the reason above, I find that the plaintiffs have the right to rescission.
>
> Judgment is given to the plaintiffs for rescission and it is ordered that the sum of RM 14,659 paid by the plaintiffs to the defendants be refunded with interest at the rate of 8% and costs. The interest is, as agreed by the parties, to take effect from 3 January 1991 to date of realisation.
>
> It is also ordered that the plaintiffs be entitled to damages on account of the non fulfillment of the agreement, the amount of such damages to be assessed by the senior assistant registrar.
>
> Other consequential orders are granted as prayed.

In the case of *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, the then Federal Court with a coram of Wan Suleiman, George Seah and Hashim Yeop Sani FJJ, dealt with the issue of misrepresentation in these salient words (at pp 322–323):

In the case of *Pertah Chunder Ghose v Mohendra Purkait* [1888–89] 16IA 233, Sir Richard Couch in giving the judgment of the Privy Council said at p 237:

> 'Where one party induces the other to contract on the faith of representations made to him, anyone of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently ...'

Under para 3 of the second agreement there was clear misrepresentation of fact that the existing biscuit factory was only occupying an area containing 90x33 feet when in actual fact, the area occupied by the respondent at the relevant time was 94x38 feet. And on 7 September 1957 the respondent had submitted an amended building plan to the Town Council applying for permission to extend the length of his factory by another 8 feet to provide for living quarters for his family. In other words, by September 1957 the respondent knew for a fact that the overall length of his biscuit factory would be 102 feet. Applying the principle enunciated in *Pertab Chunder Ghose*'s case to the facts of this case, we agree with the finding of the learned Judge that the respondent was induced by misrepresentation into signing the second agreement and in our view, the misrepresentation was fraudulent within the meaning of s 17(a) and (d) of the Contracts Act 1950 (Revised 1974). It follows as a collorary that the respondent did not consent to the execution of the second agreement within the meaning of s 13 thereof. By virtue of the provision of s 19 of the Act the second agreement was voidable at the option of the respondent, and the learned Judge was right in holding that, on the pleading, it had been lawfully repudiated by the respondent.

It was argued on behalf of the defendant that the sole remedy available to the plaintiff would be to recover damages by way of monetary compensation. It was emphasized that the first plaintiff was not entitled to rescind the said agreement. Reliance was placed by the defendant on the case of *Yeo Brothers Co (Pte) Ltd v Atlas Properties (Pte) Ltd* [1988] 1 MLJ 150 at p 153, a decision from the High Court of Singapore, and the following passage from the judgment of Lai Kew Chai J was relied upon:

> In law, one of the main duties of a vendor of property is to give a good title as to the quantity of the property. A deficiency in the smallest portion or interest in the subject matter of the sale is a breach of that duty and entitles the purchaser, at common law, to annul the sale, whereupon the purchaser is entitled to the return of all moneys paid plus the costs of the investigation of title. But generally, because of the rule in *Bain v Fothergill* (1874) LR 7 HL 158, the purchaser is not entitled to damages for any loss of the bargain. However, equity intervened and had somewhat ameliorated the rigours of the common law rule. If a misdescription is not substantial, and is made innocently by the vendor, the vendor is entitled in equity to obtain an order of specific performance on the condition, which a court in exercise of its equitable jurisdiction imposes, that he compensates the purchaser usually by an abatement of the purchase price. Justice is done and the purchaser gets his bargain substantially.

But, with respect, that was not all. His Lordship Lai Kew Chai J continued further to say and I quote (see pp 153–154):

> On the other hand, where the misdescription is substantial, the vendor is unable to enforce the contract at common law or equity, even with an abatement of the purchase price: see Mr Voumard's *Sale of Land in Victoria* (1939) at pp 195–200. In principle, this rule is sound for no court can force a purchaser to accept any property which is substantially different from the one he has contracted to purchase.
>
> The effect of a misdescription in an open contract, quite apart from any specific terms of a contract and so far as the principles are relevant to these proceedings, is compendiously set out in *Emmet on Title* (19th Ed) para 4.022 as follows:
>
> '(1) If the misdescription is substantial the vendor will be unable to enforce the contract, even with an abatement of the price *(Flight v Booth* (1834) 1 Bing NC 370; see also *Re Weston and Thomas's Contract* [1907] 1 Ch 244 — purchaser not compelled to accept personal indemnity from vendor). A misdescription will be substantial if it is as to a point '... so far affecting the subject matter of the contract that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all' (per Tindal CJ in *Flight v Booth, ante,* at p 377). This is not simply a question of value; Eve J has said: 'A vendor could not fulfil a contract to sell Whiteacre by conveying Blackacre, although he might prove to demonstration that the value of the latter was largely in excess of the value of the former. Value, no doubt, is an element to be taken into account in determining whether an error in description is substantial or material, but it is certainly not the only element, nor, in my opinion, the dominant one' (*Lee v Rayson* [1917] 1 Ch 613 at p 618). It seems clear that the question whether a misdescription is substantial or not is one of fact for the court to decide in the circumstances of each particular case *(Watson v Burton* [1957] 1 WLR 19). Thus although in this case a forty per cent overstatement of the area sold was held to be a substantial misdescription, a different decision as to a similar overstatement had been reached in an earlier case where the purchaser had apparently wanted what he saw without relying on the stated area for the price that he would pay *(Re Fawcett & Holmes's Contract* (1889) 42 ChD 15). In *Dyer v Hargrave* (1805) 10 Ves 505, on the sale of a farm by auction, the particulars described the house as being in good repair, the farm as being in a high state of cultivation, and all within a ring fence; none of these descriptions was true but the vendor was nonetheless held able to enforce the contract subject to compensation. In *McQueen v Farquhar* (1805) 8 RR 212, on the sale of a large estate, a purchaser was compelled to complete where the deficiency in description was six acres; and similarly in *Leslie v Tompson* (1851) 20 LJ Ch 561, where the deficiency was ten acres. In these three cases, in other words, the misdescription was held not to be substantial.

(2) If the misdescription is not substantial, then, provided that the misdescription was made innocently, the vendor will be able to enforce the contract, although subject to an abatement of the price by way of compensation for the insubstantial deficiency *(Jacobs* v *Revell* [1900] 2 Ch 858). This is so even though the purchaser would prefer to rescind *(Re Brewer and Hankin's Contract* (1899) 80 LT 127).'

I have so far recited the position in law and equity where there is a misdescription in an open agreement for the sale of land. The relevant principle is that where the misdescription is substantial, which is in every case a question of fact, the vendor is not entitled to a decree of specific performance even if he offers a compensation, and, of course, in the instant case, no compensation was offered at all.

and that would certainly be in favour of the first plaintiff here. The two misdescriptions by the defendant to the first plaintiff were certainly substantial. It differed from what the first plaintiff had bargained for. The first plaintiff was bargaining for the said property with the size of 1,592 sq ft and not 1,470 sq ft. The first plaintiff too was misrepresented that the building plans had been approved at the time of signing the said agreement which in reality was untrue.

Incidentally, it would be ideal to mention that the case of *Yeo Brothers Co (Pte) Ltd v Atlas Properties (Pte) Ltd*, was also reported in the *Singapore Law Journal* vide [1987] SLR 443.

At this juncture, I need to refer to s 40 of the Contracts Act 1950. That section enacts as follows:

40 Effect of refusal of party to perform promise wholly

When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

ILLUSTRATIONS

(a) *A,* a singer, enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her RM100 for each night's performance. On the sixth night *A* wilfully absents herself from the theatre. *B* is at liberty to put an end to the contract.

(b) *A,* a singer, enters into a contract with *B,* the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and *B* engages to pay her at the rate of RM100 for each night. On the sixth night *A* wilfully absents herself. With the assent of *B, A* sings on the seventh night. *B* has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through *A*'s failure to sing on the sixth night.

And using this section as a leverage, it was argued that the defendant had disabled itself from performing the contract. It is said that s 40 of the Contracts Act 1950 has to be read with s 65 of the same Act and when so read it would result in an obligation of restitution on the part of the party rescinding the contract (*Muralidhar Chatterjee v International Film Co Ltd* AIR (30) 1943 Privy Council 34; *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9 at p 15 which reversed [1966] 2 MLJ 286; and *Hims Enterpise (M) Sdn Bhd v Ishak bin Subari* [1992] 1 CLJ 132 at p 140). Dato' Seri Dr Visu Sinnadurai, a former judge of the High Court of Malaya in his renowned book entitled *The Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd Ed), succinctly wrote at pp 664–666 of the book:

> Notes
>
> 1The Privy Council in *Mumlidhar Charterjee.* rejected the suggestion that section 65 was only applicable to cases of contracts which were rescinded ab initio, that is in cases of fraud, undue influence, mistake or other element vitiating the original consensus of the parties. Their Lordships of the Privy Council held that a contract which is put to an end under section 40 is a 'voidable' contract. This is made particularly clear by illustration (c) to section 66, which in fact is an illustration to section 65: see views of Privy Council in Muralidhar Chatterjee. Illustration (c) is again the example of the same singer as in sections 40 and 75. In this illustration, it is provided that if the singer absents herself on the sixth night and the manager of the theatre rescinds the contract, the manager must pay the singer for the five nights on which she had sung. The singer is entitled to this under section 65, having conferred a benefit on the manager by singing for five nights.
>
> To further substantiate their reasoning that a contract rescinded under section 40 is a voidable contract, their Lordships also referred to sections 53 and 55 of the Indian Contract Act (sections 54 and 56 of the Malaysian Contracts Act). Sir George Rankin, in delivering the judgment of the Board, said that these sections made it clear in cases of rescission under section 40, that the party rescinding had a clear right to damages.
>
> 2The decision of the Privy Council in *Muralidhar Chatterjee v. International Film Company Ltd* above was followed by the Federal Court in the case of *Yong Mok Hin v. United Malay States Sugar Industries Ltd* (1967) 2 MLJ 9. MacIntyre J, in this case, pointed out that a party rescinding the contract under section 40 of the Contracts Act is entitled not only to claim damages under section 75 of the Contracts Act but also for the restoration of any advantage received by the defaulting party under the contract by virtue of the provisions of section 66 of the Contracts Act. His Lordship pointed out:
>
> 'Under the provisions of section 65, the obligation to restore any benefit received is restricted to the party rescinding a contract but under section 66 the obligation is extended to any party who had gained an advantage or benefit under the contract.'

(At page 15)

> It is submitted that the application of sections 66 and 75 in cases of rescission under section 40 of the Contracts Act is not correct. The appropriate section of the Contracts Act giving the party rescinding the contract the right to claim damages is section 76 and not section 75. Furthermore, sections 35 and 66 of the Contracts Act are restitutionary provisions which give the party in default the right to claim from the party rescinding the contract any benefit or advantage which he may have bestowed on the other party. It is submitted that sections 65 and 66 do not give any further rights to the party rescinding the contract. Illustration (c) to section 66 (which has also been held to apply to section 65) clearly supports the view.
>
> Furthermore, there is nothing in the judgment of the Privy Council in *Muralidhar Chatterjee's* case above to support the view adopted by MacIntyre J In fact, Sir George Rankin said quite the contrary: '... a liability to make restitution attaches to the party putting an end to the contract under [section 40 of the Malaysian Contracts Act]'. In cases of rescission under section 40 of the Contracts Act, sections 65 and 76 would be the more appropriate sections to apply to grant relief to the parties.

I would certainly subscribe to the cogent views of the learned author in the person of Dato Seri Dr Visu Sinnadurai. That would certainly reflect the correct interpretation of the law.

Now, even the illustration to s 76 of the Contracts Act 1950 is substantially the same as illustration (b) to s 40 of the same Act. In my judgment, the word 'rescind' that appears in s 76 of the Contracts Act 1950 refers to the exercise of the option to treat the contract as broken.

I will now refer to the preliminary objections of the defendant in regard to prayers (5) and (6) of the summons in chambers in enclosure one (1). It was argued on behalf of the defendant in regard to prayer (5) of encl 1 that the plaintiffs did not have the right to charge an interest at the rate of 8%pa on the purchase price of the said property because it was not a term in the said agreement and that the rate of interest was not agreed upon by the parties thereto. And in regard to prayer (6) of encl 1, it was argued that the plaintiffs did not have the right to charge an interest at the rate of 8%pa on special damages that was computed at RM109,615.18 because it was contrary to O 42 r 12 of the Rules of the High Court 1980 ('the RHC') which states as follows:

> Interest on judgment debts (Order 42 rule 12)
>
> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

The short reply and the answer to the preliminary objections would be by referring to s 11 of the Civil Law Act 1956 which enacts as follows:

11 Power of Courts to award interest on debts and damages

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section:

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

That would be the power of this court to award interest on debts and damages and it cannot be taken away by anyone.

In regard to the building plans, the defendant referred to ss 3.02 and 3.03 of the said agreement which read as follows (see exh 'TAP-1' of encl 2):

Section 3.02 Deemed Inspection of Plans

The Purchaser hereby confirms as his/its signature hereto signifies that he/it has inspected and accepted the Building Plans and specifications hereto before or at the time of execution hereof and hereby confirms that the Vendor shall be entitled from time to time to make such amendments variations or substitutions thereto as may be required by the Appropriate Authority or as its architect shall consider expedient or necessary and it is further agreed and covenanted by the Purchaser that such alterations or deletions or additions shall not give rise to or form the basis of any claim by the Purchaser against the Vendor.

Section 3.03 Overall development of Shopoffice Project

The Purchaser acknowledges that the Suite forms part of the Shopoffice Project and by reason thereof the overall development of the Shopoffice Project may affect the Suite. The Purchaser agrees and covenants that the Shopoffice Project is carried out at the absolute discretion of the Vendor who has the right to vary, change, amend or alter the Shopoffice Project or any part thereof at any time and from time to time and for such purpose to amend any plans or approvals submitted to or approved by the Appropriate Authority including the Building Plans and the aforesaid shall not affect or change in any manner the obligations of the Purchaser or the transaction under this Agreement and shall not give rise to or be the basis for any claim by the Purchaser against the Vendor.

and argued that the size of the said property was:

(a) a mere estimation and not a conclusive computatipn of the area as reflected in para 7.3 of the affidavit in reply of Chandrasekar s/o KG Ramanathan who affirmed that affidavit in reply on 20 December 2001 as seen in encl 4; and

(b) that the first plaintiff had agreed that the defendant was entitled to make any necessary amendment, variation, substitution and/or changes as required by the Architect or the authorities as reflected in para 6.2 of the affidavit in reply of Chandrasekar s/o K.G. Ramanathan in encl 4.

So, the defendant argued that when the first plaintiff executed the said agreement the first plaintiff knew about the clear and unequivocal terms contained in the said agreement and the first plaintiff must therefore be held bound by it. Reference was then made by the defendant to the case of *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163, a decision of Lim Beng Choon J, where his Lordship said at p 165 of the report:

> In considering the dispute of the parties, I must first of all bear in mind the general principles of construction of contract as enunciated in *National Coal Board v Neill (William) & Son Ltd* [1984] 1 All ER 555 where it is said at p 560:
>
> 'The first two issues involve the construction of the contract. I bear in mind the principles of construing a contact. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.'
>
> In *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Neill & Son Ltd* [1984] 1 All ER 555 case when it says at p 1290:
>
> 'Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.'

and this court was then urged to give effect to the said agreement. Proceeding ahead, it was next argued that upon the execution of the said agreement the first plaintiff was estopped from raising an issue in regard to the area differences in the floor area of the said property. It was also argued that the first plaintiff was estopped from raising the issue in regard to the building plans of the said property which encompassed the whole shop office project. Towards this end, the case of *Boustead Trading (1985) Sdn*

Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, a decision of the Federal Court with the coram of Anuar CJ (Malaya), Wan Adnan FCJ and Gopal Sri Ram JCA was referred to. At the headnote, under held (2) it was stated:

> The doctrine of estoppel is a flexible principle by which justice is done according to the circumstances. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. The maxim 'estoppel may be used as a shield but not a sword' does not limit the doctrine of estoppel to defendants alone. Plaintiffs too may have recourse to it. Estoppel may assist a plaintiff in enforcing a course of action by preventing a defendant from denying the existence of some fact which would destroy the cause of action.

And Gopal Sri Ram JCA who delivered the judgment of the Federal Court said in the main body of the judgment at p 345 thereto:

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575 as follows:
>
> 'The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*' (Emphasis added.)

Continuing further, his Lordship Gopal Sri Ram JCA said at pp 346–347 of the report:

> In *MA A Holdings Sdn Bhd & Anor v Ng Siew Wah & Ors* [1986] 1 MLJ 170, VC George J (now JCA) was faced with a case where the defendant had remained silent while the purchaser had paid moneys to him. Of the defendant's silence, that learned judge said at p 176:
>
> 'Having silently stood by and allowed the purchasers to find and pay the balance of the purchase price and then wait for another 38 days before insisting on compliance of the requirement to apply to the FIC although the parties had expressly agreed that whether the FIC approval was obtained or not was not to have any effect on the contract is I think the

height of inequity. Robert Goff J stated the principle of this aspect of equitable estoppel in *Societe Italo-Belge v Palm Oils* [1982] 1 All ER 19 at pp 26–27 thus:

> "The fundamental principle is that stated by Lord Cairns LC, viz, that the representor will not be allowed to enforce his rights where it would be inequitable having regard to the dealings which have thus taken place between the parties. To establish such inequity, it is not necessary to show detriment; indeed, the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights. Take the facts of *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; [1956] 1 All ER 256, the case in which Denning J breathed new life into the doctrine of equitable estoppel. The representation was by a lessor to the effect that he would be content to accept a reduced rent. In such a case, although the lessee has benefited from the reduction in rent, it may well be inequitable for the lessor to insist on his legal right to the unpaid rent, because the lessee has conducted his affairs on the basis that he would only have to pay rent at the lower rate; and a court might well think it right to conclude that only after reasonable notice could the lessor return to charging rent at the higher rate specified in the lease. Furthermore it would be open to the court, in any particular case, to infer from the circumstances of the case that the representee must have conducted his affairs in such a way that it would be inequitable for the representor to enforce his rights, or to do so without reasonable notice."

Lord Denning in WJ Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189 said:

> "If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so."'

And, using *Boustead Trading* as a strong reference, it was submitted on behalf of the defendant that:

(a) the first plaintiff was not only bound to the said agreement but, at the same, it was also estopped from denying that ss 3.02 and 3.03 of the said agreement would apply to them; and

(c) consequently, the issue of misrepresentation did not arise at all in favour of the first plaintiff.

The learned counsel for the first plaintiff responded well to the occasion. It was rightly and correctly submitted that the defendant had never, at all material times, proved or showed proof that it was 'expedient' or 'necessary' (the words employed in s 3.02 of the said agreement) to make any 'such amendments, variations or substitutions' (the words employed in s 3.02 of the said agreement) to the approved building plans. It was also correctly

submitted that the right of the defendant as the vendor to 'vary, change, amend or alter' the shop office project wherein the said property was located (the words employed in s 3.03 of the said agreement) that were said to be required to be done can only be done on the approved building plans and that it cannot be done on the building plans that have yet to be approved bearing in mind that such variation, change, amendment or alteration require the approval of the appropriate authority. It must be borne in mind that building plans that have not been approved by the appropriate authority would rightly be termed as 'proposed building plans'. In the context of the present case, by looking at s 2.04 of the said agreement it cannot be denied that the building plans 'have been approved by the appropriate authority' — which would be the Dewan Bandaraya Kuala Lumpur, which meant that everything was taken into account and that the defendant was selling 1,592 sq ft of the said property to the first plaintiff who was desirous of buying and occupying it for its business venture. As it turned out, the first plaintiff did purchase the said property. Section 1.01 of the said agreement read with Schedule 'A' thereto and s 2.04 of the said agreement were fundamental terms to the contract that attracted the first plaintiff to the said property and finally were instrumental in the first plaintiff executing the said agreement. If the appropriate authority had not approved the building plans, the first plaintiff would not have executed the said agreement. It was correctly submitted that the defendant had not shown any evidence that the:

(a) approved building plans had to be amended or altered; and

(b) that such amendments or alterations have been approved by the appropriate authority.

One must look at the degree of importance to be attached to the terms of the contract by the aggrieved party. So, when will a breach be called 'fundamental'? It is certainly up to the court. Thus, the court may attach importance to the terms which the parties would seem attracted to it and which had been broken or the court would decide the serious consequences that flow from that breach (*Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 at p 615. Judges from other jurisdictions have described in many ways what would constitute a fundamental breach. A few examples would suffice:

(a) that the breach will go to the whole root of the contract and not merely part of it (per Lord Ellenborough in *Davidson v Gwynne* (1810) 12 East 381 at p 389);

(b) that it goes deeper to the root of the contract so much so that it makes further performance impossible (per Upjohn J in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26 at p 64, [1962] 1 All ER 474 at p 484); and

(c) it affects the very substance of the contract (per Fletcher Moulton LJ in *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 at p 1012).

A But, I think, the best approach would be that as adopted by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SRNSW 632 at p 641. This was what his Lordship said:

> The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.

I would subscribe and gratefully adopt the sage words of Jordan CJ in that case to the facts of this case. In my judgment, the first plaintiff attached importance to the two terms which constituted misrepresentations that were made by the defendant and which the defendant knew were of importance to the first plaintiff. And that these two terms which constituted misrepresentations were instrumental in drawing the first plaintiff to the contract and finally executing the same.

In regard to the issue of estoppel, the case of *Boustead Trading* would also be favourable to the first plaintiff. In the headnote, under column obiter, it was stated that:

> 2 All that a litigant who invokes the doctrine of estoppel must do is to show that he was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his strict legal rights. There is no need to show that he was induced to act in a particular way.

Being a flexible principle, the doctrine of estoppel would also apply to the defendant. Having decided by way of the said agreement to sell the said property measuring 1,592 sq ft, the defendant cannot now say that they want to amend and sell the said property measuring 1470 sq ft. The defendant must be estopped from reneging from its own agreement.

In regard to the recovery of damages, I have this to say. Damages are usually granted as compensation for the damage, loss or injury which an injured party has sustained arising from a breach of contract. Section 74 of the Contracts Act 1950 is certainly useful. It enacts as follows:

> Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

According to Ong FJ in *Teoh Kee Keong v Tambun Mining Co Ltd* [1968] 1 MLJ 39:

> Section 74 (1) of the Contracts (Malay States) Ordinance 1950 is the statutory enunciation of the rule in *Hadley v Baxendale* (1854) 9 Ex 341).

Now, under s 74 of the Contracts Act 1950, the party may recover any loss or damage or any breach which:

(a) naturally arose in the usual course of things; or

(b) which the parties knew, when they made the contract, to be likely to result from a breach of the contract.

Even the illustrations to s 74 of the Contracts Act 1950 clearly show that the party may recover damages for other expenses incurred as a result of the breach. This would include the loss of profits arising as a result of the breach. It would also include the difference between the price of the goods as contracted for and the actual price of the goods that were sold for as a result of the breach.

The principle behind awarding damages for breach of contract is this. It is to put the injured party to the position he would be in had the contract been performed. Parke B explained it better in the case of *Robinson v Harman* (1880) 5 App Cas 25, at p 35:

> The rule of the common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

Then, there is the rule concerning remoteness of damage. For this exercise, it would be ideal to refer to the speech of Alderson B, who delivered the judgment of the Court of Exchequer in *Hadley v Baxendale* (1854) 9 Ex 341, at p 354:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Conclusion

The upshot of it all would be this. I gave an order in terms of encl 1, particularly at prayers (1), (2), (5), and (7). I too gave costs to the plaintiffs and this would fall under prayer (8) of encl 1.

In regard to prayers (3), (4) and (6) of encl 1, I gave an order that these prayers be disposed of by the senior assistant registrar.

Application allowed with damages to be assessed.

Reported by Sivapragasam Kumaran